

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 1312000103
)	
A'KEEM GRINNELL-CROPPER,)	
)	
Defendant.)	
)	

Submitted: November 21, 2016
Decided: January 25, 2017

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED
AND
COUNSELS' MOTION TO WITHDRAW SHOULD BE GRANTED.**

Brian J. Robertson, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Patrick J. Collins, Esquire and Matthew C. Buckworth, Esquire, 716 North Tatnall
Street, Suite 300, Wilmington, Delaware, 19801, Attorneys for Defendant.

PARKER, Commissioner

This 25th day of January, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. On January 21, 2014, Defendant A-Keem Grinnell-Cropper was indicted on charges of Possession of a Firearm By a Person Prohibited ("PFBPP"), Possession of Ammunition By a Person Prohibited ("PABPP") and Carrying a Concealed Deadly Weapon ("CCDW"). The charges stemmed from a vehicle stop on November 30, 2013, during which Defendant, a passenger in the vehicle, was found to be in possession of a loaded firearm.
2. A motion to suppress was filed by defense counsel on Defendant's behalf¹, and following a hearing on the motion on May 16, 2014, the motion was denied.²
3. After the denial of the suppression motion, on May 28, 2014, the case proceeded to a non-jury trial. The Superior Court found Defendant guilty of PFBPP and PABPP.
4. The Superior Court granted Defendant's Motion for Judgment of Acquittal following the close of the State's case at trial on the CCDW charge. The indictment on the CCDW charge incorrectly stated that the offense occurred on February 11, 2008, rather than November 30, 2013.³
5. On October 3, 2014, following a pre-sentence investigation, Defendant was sentenced. On the PFBPP, Defendant was sentenced to 15 years at Level V, suspended after 5 years, for decreasing levels of probation. On the PABPP, Defendant was sentenced to 8 years at Level V, suspended after 6 months, followed by probation.

¹ Superior Court Docket No. 10.

² Superior Court Docket No. 15.

³ May 28, 2014 Trial Transcript, pgs. 27-28.

6. Defendant filed a direct appeal to the Delaware Supreme Court. In Defendant's direct appeal, he appealed the denial of his suppression motion. On September 16, 2015, the Delaware Supreme Court determined that the appeal was without merit and affirmed the judgment of the Superior Court.⁴

7. Specifically, on direct appeal, the Delaware Supreme Court held that: "Based upon the combination of [the arresting officer's] specialized objective training and subjective familiarity with [Defendant's] normal behavior, [the officer] had a reasonable articulable belief that [Defendant] was armed and presently dangerous. Accordingly, we hold that under the totality of the circumstances, the pat-down search of [Defendant] by [the officer] was permitted by the Fourth Amendment."⁵

8. Thereafter, on November 23, 2015, Defendant filed a motion for modification/reduction of sentence.⁶ In that motion, Defendant claimed, *inter alia*, that his counsel was ineffective, that his suppression motion should have been granted, and that family issues should warrant a sentence reduction. By Order dated March 7, 2016, the Superior Court denied Defendant's motion finding it to be without merit. The Superior Court held that the sentence was appropriate for all the reasons stated at the time of sentencing.⁷

9. On October 26, 2016, Defendant filed another motion for reduction or modification of sentence.⁸ In that motion, Defendant re-raised various claims that he raised in his first motion for sentence reduction. By Order dated December 19, 2016, the

⁴ *Cropper v. State*, 2015 WL 5453097 (Del.).

⁵ *Cropper v. State*, 2015 WL 5453097, at *4 (Del.).

⁶ Superior Court Docket No. 37.

⁷ Superior Court Docket No. 46.

⁸ Superior Court Docket No. 56.

Superior Court denied Defendant's motion. The Superior Court again held that the sentence was appropriate for all the reasons stated at the time of sentencing.⁹

FACTS

10. On November 13, 2013, a traffic stop was conducted in the West Center City area of Wilmington, Delaware. Defendant was seated in the front passenger seat. During that traffic stop, Defendant, a person prohibited, was found with a loaded handgun tucked in the waistband of his pants.¹⁰

RULE 61 MOTION AND COUNSEL'S MOTION TO WITHDRAW

11. On October 5, 2015, Defendant filed a *pro se* motion for postconviction relief. Defendant was thereafter assigned counsel.

12. On June 28, 2016, assigned counsel filed a Motion to Withdraw as Postconviction Counsel pursuant to Superior Court Criminal Rule 61(e)(6).

13. Superior Court Criminal Rule 61(e)(6) provides that:

If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the movant may file a response to the motion within 30 days of service of the motion upon the movant.

14. In the motion to withdraw, Defendant's Rule 61 counsel represented that, after undertaking a thorough analysis of the Defendant's claims, counsel has determined that the claims are so lacking in merit that counsel cannot ethically advocate any of them.¹¹ Counsel further represented that, following a thorough review of the record, counsel was

⁹ Superior Court Docket No. 58.

¹⁰ See, *Cropper v. State*, 2015 WL 5453097, *1-2 (Del.).

¹¹ See, Superior Court Docket No. 50- Defendant's Rule 61 counsel's Motion to Withdraw along with the accompanying Memorandum in Support of Motion to Withdraw.

not aware of any other substantial claim for relief available to Defendant.¹² Defendant's Rule 61 counsel represented to the court that there are no potential meritorious grounds on which to base a Rule 61 motion and has therefore sought to withdraw as counsel.¹³

15. Although initially Defendant informed Rule 61 counsel that he did not desire to file a response to counsel's motion to withdraw,¹⁴ he later changed his mind and advised the court that he would like to raise "new arguments" in support of his Rule 61 motion.¹⁵

16. Defendant's request to submit "new arguments" in support of his Rule 61 motion was granted¹⁶, and on September 29, 2016, Defendant's additional "points for consideration" were submitted to the court.¹⁷

17. Following the receipt of Defendant's additional points for consideration, the court requested Defendant's Rule 61 counsel to advise whether counsel still sought to withdraw or whether counsel's position had changed in light of the additional points for consideration.¹⁸

18. By letter dated November 21, 2016, Defendant's Rule 61 counsel advised the court that after a thorough review of the record and after consideration of the additional points for consideration raised by Defendant, Rule 61 counsel still remain unable to assert any meritorious postconviction claims and that they continue to stand by their motion to withdraw.¹⁹

¹² *Id.*

¹³ *Id.*

¹⁴ See, Superior Court Docket No. 50, at pg. 14.

¹⁵ Superior Court Docket No. 52.

¹⁶ Superior Court Docket No. 53.

¹⁷ See, Superior Court Docket No. 54.

¹⁸ Superior Court Docket No. 55.

¹⁹ Superior Court Docket No. 57, Rule 61 counsel's November 21, 2016 letter to court.

19. Defendant's trial counsel also submitted an Affidavit in response to Defendant's Rule 61 motion responding to Defendant's ineffective assistance of counsel claims.²⁰

20. In order to evaluate Defendant's Rule 61 motion and to determine whether Defendant's Rule 61 counsels' motion to withdraw should be granted, the court should be satisfied that Rule 61 counsel made a conscientious examination of the record and the law for claims that could arguable support Defendant's Rule 61 motion. In addition, the court should conduct its own review of the record in order to determine whether Defendant's Rule 61 motion is so totally devoid of any, at least, arguable postconviction claims.²¹

DEFENDANT'S RULE 61 MOTION IS WITHOUT MERIT

21. This case was a one-issue case. The only possible defense was that the search was not supported by reasonable suspicion and that the evidence seized (the gun) should have been suppressed. Defendant's trial counsel filed a suppression motion, a hearing was held, and the motion was denied. The denial of the suppression motion was raised on direct appeal, and the denial of the motion was affirmed by the Delaware Supreme Court.

22. There were no factual defenses available to Defendant. Defendant, a person prohibited, was found with a loaded gun during a traffic stop. Defendant's prior felony conviction, carrying a concealed deadly weapon, classified him as a person prohibited.

23. The bench trial was in essence a stipulated trial because Defendant did not have any factual defenses, and the trial needed to be concluded before the suppression issue could be challenged on appeal. At trial, the State called one witness, the arresting officer, who testified about the traffic stop and the recovery of the gun on Defendant's person. After direct examination, defense counsel did not ask any questions because nothing that

²⁰ Superior Court Docket No. 36.

²¹ See, for example, *Roth v. State of Delaware*, 2013 WL 5918509, at *1 (Del. 2013)(discussing standard to be employed when deciding counsel's motion to withdraw on a defendant's direct appeal.).

he could ask would change the fact that the police officer recovered the gun from Defendant's person.²² At the close of the State's case, defense counsel successfully sought the dismissal of the CCDW charge due to a defect in the indictment. There was no defect in the indictment on the other two charges: PFBPP and PABPP. Not having any viable factual defenses, Defendant was convicted on the remaining two charges.

24. The suppression issue was then raised on direct appeal, and the Delaware Supreme Court affirmed the decision of the Superior Court concluding that the search and seizure, under the facts and circumstances of this case, were permissible and proper.

25. In Defendant's Rule 61 motion he raises claims complaining about the suppression motion, the trial, and the direct appeal. His claims consist mostly of alleged shortcomings of his counsel, but he also raises claims as to the court's ruling on the suppression motion, the trial court's alleged error in not overruling/reversing the suppression ruling, and an alleged defect in the indictment.

26. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.²³ The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.²⁴

²² Superior Court Docket No. 36, Defense Counsel's Affidavit in response to Defendant's Rule 61 motion, at pgs. 1-2.

²³ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

²⁴ *Id.* at 687-88, 694.

27. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.²⁵ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.²⁶ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.²⁷

28. In *Harrington v. Richter*,²⁸ the United States Supreme Court explained the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington*, the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.²⁹ Counsel's representation must be judged by the most deferential of standards.³⁰

29. Turning first to the suppression motion, in the subject Rule 61 motion, Defendant essentially claims that his trial counsel was ineffective for not prevailing on the motion. Defendant contends that something more should have been done.

30. The record reflects that the judge hearing the suppression motion found the motion to be well-presented and well-argued by defense counsel. Indeed, the judge commented that Defendant's counsel "presented a well-articulated and well-argued motion to suppress. He presented a very reasonable argument. . . [Counsel] did make very good argument . . . Nevertheless, I do find that the State met its burden."³¹

²⁵ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

²⁶ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

²⁷ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

²⁸ *Harrington v. Richter*, 131 S.Ct. 770 (2011).

²⁹ *Id.* at *791.

³⁰ *Id.* at *787-88.

³¹ Suppression Hearing Transcript dated May 16, 2014, at pg. 57.

31. Like the hearing judge, Defendant's Rule 61 counsel could find no deficiency in the content or presentation of defense trial counsel's motion to suppress.³²

32. Following a thorough review of the record, including the suppression motion, suppression hearing, and suppression issue raised on direct appeal, the undersigned is also in agreement that defense counsel does not appear to be deficient in any regard in the content or presentation of the motion to suppress.

33. At the suppression hearing, the arresting officer testified that he had reason to suspect that Defendant was armed and dangerous so as to justify the pat-down search of Defendant's person. Defendant, with whom the arresting officer was familiar was acting peculiar during the detention, and the arresting officer's specialized training about the characteristics of an armed gunman taught him that the behaviors exhibited by Defendant were indicative of a person armed with a firearm.³³

34. In Defendant's additional points for consideration, he contends that counsel should have raised the fact that the medication he was on at the time of the traffic stop could have been the reason why he was acting peculiar. He also contends that counsel should have called expert witnesses to testify as to what medications Defendant was taking, to discuss his "mental disabilities", and to discuss possible side-effects of his medications. Defendant also contends that his counsel should have called the other police officer at the scene of the incident to testify to determine if he agreed with the testifying officer as to whether Defendant was acting peculiar.

35. What Defendant fails to appreciate is that it does not matter what actually caused Defendant to act peculiar at the time of the stop. What matters is the arresting officer's

³² Superior Court Docket No. 50, at pg. 12.

³³ May 16, 2014 Suppression Hearing Transcript, at pgs. 14-21.

perception of Defendant's behavior. The issue was whether the arresting officer had a reasonable articulable belief that Defendant was armed and presently dangerous. The Superior Court held, and the Delaware Supreme Court affirmed, that based upon the combination of the arresting officer's specialized objective training and subjective familiarity with Defendant's normal behavior, the arresting officer had a reasonable articulable belief that Defendant was armed and presently dangerous.³⁴ Thus, whether Defendant was acting peculiar because he was armed and dangerous, or whether he was acting peculiar because he was on medication or for that matter illegal drugs, or any combination thereof, is of no importance. What mattered is whether the arresting officer's belief that Defendant was armed and dangerous based on his behavior was reasonable. The Superior Court ruled that the arresting officer's belief was reasonable under the facts and circumstances of this case and the Delaware Supreme Court agreed with that determination.

36. The decision as to whether or not to call a witness and how to examine and/or cross-examine witnesses who are called are tactical decisions.³⁵ Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.³⁶ Trial counsel was not deficient for not introducing issues during the suppression motion that had little or no bearing on the arresting officer's perception at the time of the traffic stop and subsequent search and seizure.

37. Although Defendant claims that his counsel should have raised more challenges to the court's ruling on the suppression issue, he does not provide details as to what

³⁴ See, *Cropper v. State*, 2015 WL 5453097, at *4 (Del.).

³⁵ *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

³⁶ *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

specific challenges should have been raised and how such challenges would have helped the defense. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.³⁷ Defendant has not established that his counsel was deficient in any regard in the handling of his suppression motion nor has he established that he suffered any actual prejudice as a result thereof.

38. Defendant also takes issue with the Superior Court judge's ruling on his motion to suppress. Defendant claims that the ruling should have been challenged. It was challenged. An appeal was taken and the Delaware Supreme Court affirmed the decision. The Delaware Supreme Court has already fully considered and decided the suppression issue. It is now procedurally barred as previously adjudicated.³⁸ The Delaware Supreme Court's decision affirming the Superior Court's denial of the suppression motion cannot again be challenged in this Rule 61 motion.

39. Although disappointed with the result, Defendant's claims relating to the suppression motion, including his claims of ineffective assistance of counsel, are without merit.

40. Turning next to the trial, Defendant claims that his counsel was ineffective for the handling of his trial. Defendant contends that counsel should have cross-examined the witness at trial, should have called witnesses to testify on his behalf, should have had a more effective trial strategy, should have raised defenses, should have called an expert witness, should have raised some unspecified "mental disabilities", should have raised defenses, and should have given Defendant an opportunity to testify on his own behalf.

³⁷ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, *2 (Del.Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

³⁸ Superior Court Criminal Rule 61(i)(4).

41. The facts at trial were simple and straightforward. Defendant, a person prohibited, was in possession of a loaded gun. Counsel recognized that, at trial, there was no factual defense as the gun was clearly recovered from Defendant's waistband and the Defendant was a felon.³⁹ No amount of cross-examination would change those facts.⁴⁰ Defense counsel recognized that there was no factual defense at trial that would have been successful.⁴¹

42. Defendant appears to have wanted defense counsel to use the trial as a second opportunity to re-raise the suppression issue. The validity of the search and seizure was already raised and ruled on by the Superior Court at the suppression hearing. At trial, the trial court explained that the trial was not the time or forum to re-raise the suppression issue.⁴²

43. An ineffective assistance of counsel claim based on the failure to object to testimony is without merit if trial counsel lacked a legal or factual basis to object to the testimony.⁴³ Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.⁴⁴ Counsel's decision not to challenge the evidence at trial, and to appeal the suppression motion following the trial, is a common practice and is not deficient in any regard in light of the facts and circumstances of this case. Nothing that defense counsel could have done (ie. cross-examining the police officer, calling other witnesses, Defendant testifying, calling expert

³⁹ Affidavit of Defense Counsel in response to Rule 61 motion, at pgs. 1-2- Superior Court Docket No. 36.

⁴⁰ Affidavit of Defense Counsel in response to Rule 61 motion, at pgs. 1-2- Superior Court Docket No. 36.

⁴¹ Affidavit of Defense Counsel in response to Rule 61 motion, at pgs. 1-3- Superior Court Docket No. 36.

⁴² May 28, 2014 Trial Transcript, at pgs. 31-32, 38-40, 52.

⁴³ *State v. Exum*, 2002 WL 100576, at *2 (Del.Super.), *affirmed*, 2002 WL 2017230, at *1 (Del.).

⁴⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, *2 (Del.Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

witnesses, doing an opening or closing) would change the undisputed fact that Defendant, a person prohibited, was in possession of a loaded gun.

44. Defendant claims that he was not given the opportunity to testify on his own behalf. Contrary to his representation in the subject motion, Defendant was given the opportunity to testify on his own behalf and he expressly declined to do so.⁴⁵ During the trial, the court engaged in a colloquy with Defendant. At one point during the trial, Defendant wanted to represent himself and ask some questions to the police officer. The trial court engaged in a lengthy discussion with Defendant about the consequences of representing himself and what he could expect if he decided to proceed without counsel.⁴⁶ Ultimately, Defendant chose to have trial counsel continue to represent him.⁴⁷ At the end of the discussion, the court asked Defendant if he wished to testify on his own behalf and Defendant stated that he did not wish to testify.⁴⁸

45. Although disappointed with the outcome of the trial, nothing that defense counsel could have done would have changed the result. Defense counsel's handling of the trial was not deficient nor has Defendant established any actual prejudice as a result thereof.

46. Turning to the direct appeal, Defendant complains that his counsel was ineffective for not raising additional issues on appeal. Defendant also complains that the direct appeal should have been taken immediately after the ruling on the suppression motion and before the trial.

⁴⁵ May 28, 2014 Trial Transcript, at pg. 52.

⁴⁶ May 28, 2014 Trial Transcript, at pgs. 32-52.

⁴⁷ May 28, 2014 Trial Transcript, at pg. 52.

⁴⁸ May 28, 2014 Trial Transcript, at pg. 52.

47. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.⁴⁹ This case was a one-issue case. Defendant does not elaborate on what additional meritorious issues could have been raised on appeal. Moreover, after conducting an independent review of the record, the undersigned agrees with defense trial counsel and Rule 61 counsel that there does not appear to be any other meritorious issues that could have been raised on appeal. Let alone a meritorious issue that had any likelihood of success.

48. Defendant appears to claim that the suppression issue should have been appealed immediately to the Delaware Supreme Court rather than waiting to appeal the ruling after the trial. However, the appeal was, in fact, properly taken after the disposition of the case. Defendant does not appear to understand the procedure for appealing a pretrial ruling. The direct appeal was properly filed after there was a guilty verdict following the trial.

49. Defendant appears to be of the misimpression that the trial judge was of the opinion that the suppression motion was decided incorrectly and that, therefore, the trial judge should have reversed the suppression motion judge's ruling. The colloquy between the court and Defendant during the trial reflects that the trial judge indicated no such opinion.⁵⁰ The trial judge explained to Defendant that it appeared to the court that his only defense would be at the suppression level. The trial judge further explained that the suppression issue was addressed and ruled upon and that is the law of the case. The trial court explained that the evidence presented in a motion to suppress is different from the

⁴⁹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, *2 (Del.Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

⁵⁰ May 28, 2014 Trial Transcript, at pgs. 30-40, 52.

evidence presented to the fact finder at trial.⁵¹ The trial court did not disagree with the suppression motion judge's ruling. The trial court did not express a view as to whether the ruling was correct or incorrect. The trial court simply explained that the trial was not the time or forum to re-raise the suppression issue but that the issue was preserved for appeal. The suppression issue was appealed to the Delaware Supreme Court and was affirmed. The issue is now settled.

50. Finally, Defendant complains that the indictment was not numbered, signed by the Foreperson, nor were Indictment Numbers included on the counts. This is not correct. The indictment was, in fact, numbered, signed by the Foreperson, and Indictment Numbers were included for each of the counts in the original indictment contained in the court file.⁵²

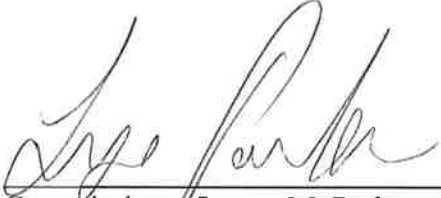
51. The court has reviewed the record carefully and has concluded that Defendant's Rule 61 motion is without merit and devoid of any other substantial claims for relief. The court is also satisfied that Defendant's Rule 61 counsel made a conscientious effort to examine the record and the law and has properly determined that Defendant does not have a meritorious claim to be raised in his Rule 61 motion.

⁵¹ *Id.*

⁵² See, Superior Court Docket No. 3- Indictment dated January 21, 2014.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied and Defendant's Rule 61 counsels' motion to withdraw should be granted.

IT IS SO RECOMMENDED.



Commissioner Lynne M. Parker

oc: Prothonotary
cc: Timothy J. Weiler, Esquire
Mr. A'Keem Grinnell-Cropper